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Supreme Court, U.S.
FILED
OCT 15 2003
OFFICE OF THE CLERK

No. 03-163

IN THE
Supreme Court of the United States

THE CITY OF SAN ANTONIO,

Petitioner,

v.

ENCORE VIDEOS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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ARGUMENT IN REPLY

Respondent's brief in opposition to the petition offers two arguments for denying the petition. The first argument, however, simply demonstrates that the circuits are split on the question presented. Respondent's second argument – based on a factual assumption made by the appeals court – demonstrates that this Court should grant certiorari to clarify that such assumptions do not invalidate reasonable zoning standards for sexually explicit businesses.

I. The Split in the Circuits is Clear.

This Court has repeatedly held that in enacting zoning regulations for sexually oriented businesses, cities may rely upon any evidence "reasonably believed to be relevant" to the goal of preventing secondary effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); *see also id.* at 451 (Kennedy, J., concurring in judgment); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

The Sixth, Eighth, and Tenth Circuits have relied on this standard to uphold zoning ordinances as applied to sexually oriented book and video stores that do not have "peep-show" booths on the premises. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998). In contrast, the Fifth Circuit invalidated San Antonio's zoning ordinance for an alleged failure to produce secondary effects evidence specific to "establishments that sell adult products solely for off-site consumption." Pet. App. 13a.

Encore purports to argue that no conflict exists, but then proceeds to identify the conflict and contends that "these cases need to be reevaluated in light of" *Alameda Books*. Respondent's Brief in Opposition at 2. Moreover, the Fifth Circuit noted the conflict between its position and that of the Eighth and Tenth Circuits. Pet. App. 13a (following *World Wide Video, Inc. v. Tukwila*, 816 P.2d 18, 21 (Wash. 1991) and rejecting *ILQ* and *Z.J. Gifts*).

In enacting its zoning ordinance, the City of San Antonio relied upon much of the same evidence that was found sufficient for Rochester, Minnesota and Aurora, Colorado in *ILQ* and *Z.J. Gifts*, respectively. For example, the legislative record of all three ordinances included, *inter alia*, the Indianapolis, Indiana study conducted in 1984. *See ILQ*, 25 F.3d at 1418; *Z.J. Gifts*, 136 F.3d at 687 n.1; Pet. App. 66a. That study:

> included a national survey of real estate appraisers. Of the 507 responding appraisers, 80% opined that an adult bookstore would reduce the value of residential properties within one block of the site, and 72% opined that an adult bookstore would reduce the value of commercial properties within one block.

ILQ, 25 F.3d at 1418.

The *ILQ* decision, upon which the City also relied in defending its ordinance, described the adverse impacts of adult businesses, including an adult bookstore, found in a St. Paul, Minnesota study:

> The documented secondary effects included "discarded pornographic literature allegedly found in the streets,

> sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and ... becomes available to minors even though its sale to minors is prohibited."

Id.

Both the Eighth Circuit and the Tenth Circuit found that this kind of information was "reasonably believed to be relevant" to the problems that Rochester and Aurora sought to avoid by requiring adult bookstores – even those without peep-show booths for "on-premises" viewing of videos – to remain minimum distances from residences. Simply put, nothing in the legislative evidence suggested that the depressive effect of adult bookstores on nearby property values or the problem of pornographic litter turned on the sub-category of adult bookstore at issue. Rather, the *ILQ* and *Z.J. Gifts* courts permitted the municipalities to make the logical inference that such effects flow from the presence of a *pornographic bookstore* in the neighborhood, regardless of whether the enterprise has booths or mini-theaters for displaying its sexually explicit fare.

Not so in the Fifth Circuit. The "heightened specificity" requirement applied to San Antonio's legislative record by the panel below is clearly at odds with the version of the *Renton* standard applied by the Eighth and Tenth Circuits. Additionally, it is contrary to the *Renton* standard as applied by certain district courts after *Alameda Books*. *See, e.g., World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143, 1155 (E.D. Wash. 2002) (upholding zoning ordinance against "retail-only" adult bookstore's challenge, and finding that *Alameda Books* is consistent with both *Z.J. Gifts* and *ILQ Investments*); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp.2d 385, 395 (D. Md. 2003) (following *ILQ* and upholding ordinance as applied to adult bookstore without peep-show booths).

Despite Respondent's protestations to the contrary, the conflict in the circuits over the question presented is apparent, and this Court should accept certiorari to resolve the conflict.

II. The Lower Court Misconstrued the Scope of the Ordinance and Relied Upon False Assumptions About Its Application.

Encore seizes upon the unsupported assumption made by the lower court that "even ordinary bookstores and video stores with adult sections could be subjected to regulation...." Pet. App. 13a; Respondent's Brief in Opposition at 10.

There is absolutely no evidence in the record, however, to support the assumption that San Antonio's ordinance will affect mainstream bookstores. This is because no evidence suggests that any "ordinary" bookstore in San Antonio has "*more than 20%* of its inventory" in materials "*characterized by their emphasis on* ... specified anatomical areas or specified sexual activities" or in "non-contraceptive instruments, devices, toys, or paraphernalia designed for use in connection with specified sexual activities...." Ordinance 87443, Pet. App. 70a-71a.

The City, following *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54 n.4 (1976), defined "specified anatomical areas" to include "the human genitals, crevice of the buttocks, pubic region, anus, and the areola of the post-puberty female breast." Pet. App. 74a. Similarly, the ordinance narrowly defines "specified sexual activity" as:

> [A]ctual or simulated human genitals in a state of sexual stimulation or arousal, actual or simulated human masturbation, sexual intercourse, sodomy, fellatio, cunnilingus, fondling or other erotic touching of human genitals, pubic region, buttock or female breast, and excretory functions as part of or in connection with the above described activity.

Ordinance 87443, Pet. App. 74a.

For inventory to count under the ordinance, it is not sufficient that the item contain a picture with incidental nudity, full frontal nudity, or an ultimate sex act. Rather, the magazine or movie must be *characterized by an emphasis upon* such depictions.

In construing a similar adult bookstore definition in the Dallas ordinance, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 255 n. 5 (1990) (Scalia, J., concurring in part and dissenting in part), Justice Scalia noted that the ordinance "would be interpreted to apply only to businesses that not only (1) offer live nudity or hard-core sexual material, (2) as a constant and intentional objective of their business, but also (3) seek to promote it as such." *Id.* at 261.

Encore attempts to distinguish the San Antonio definition from the Dallas definition on the grounds that the Dallas definition did not use a percentage of inventory, but rather defined an adult bookstore as a commercial establishment that has "as one of its principal business purposes" the sale of materials "which depict or describe 'specified sexual activities' or 'specified anatomical areas.'" *Id.* at 254 n. 5; *see* Respondent's Brief in Opposition at 9-10. This purported distinction is unpersuasive.

First, a business that has "more than 20% of its inventory" in hard-core sexual materials can hardly claim that the sale of such materials is not "one of its principal business purposes." Second, the San Antonio ordinance is arguably more narrow than the Dallas ordinance, since that ordinance covered materials "which depict or describe" specified anatomical areas and specified sexual activities, whereas the San Antonio ordinance counts, toward the adult use classification, only materials *characterized by an emphasis upon* displays of those

areas and activities. *ILQ*, 25 F.3d at 1419 ("The limiting term, 'characterized by an emphasis' on the sexually explicit, which ILQ characterizes as overly broad, has been widely construed since it was discussed and upheld in the Supreme Court's 1976 decision in American Mini Theatres").

Thus, there is no meaningful distinction between the instant ordinance and Dallas ordinance. Neither encompasses mainstream bookstores. Again, neither Encore nor the court below pointed to any record evidence supporting its assumption that "ordinary" bookstores – such as Barnes & Noble or Waldenbooks – have greater than 20% of their inventory in sex toys or materials *characterized by an emphasis upon* graphic nudity and sex acts. No such evidence exists.

Encore asserts that "the quantity of speech will be reduced," Respondent's Brief in Opposition at 9, but fails to give one example, in the years since the ordinance's passage, of how a mainstream bookstore has been targeted or speech has been reduced.

Moreover, Encore – which formerly operated in a valid location – does not deny that a properly zoned adult bookstore can have 100% of its inventory in sexually graphic material, and that the ordinance provides adequate sites for adult businesses. Pet. App. 49a.

Instead, Encore argues that the ordinance is unconstitutional due to its potential impact on *other* businesses not before the Court. In rejecting a similar challenge to an adult business zoning ordinance, the Texas Court of Appeals held that:

> In the absence of evidence that the main-line chain bookstores in question had at least 20% of their "stock and trade" devoted to sexually oriented material ... or that they were dealing in sexually related instruments, devices, or paraphernalia, the appellants have failed to

show that those stores fell within the application of the ordinance.

Malloy v. City of Lewisville, 848 S.W.2d 380, 383 (Ct. App. Tex. 1993).

Likewise, Encore has failed to show "from the text of [the law] and from actual fact," *Virginia v. Hicks*, 123 S. Ct. 2191, 2198 (2003), that *any* impermissible applications of the ordinance have been advanced by the City.

III. The Lower Court Misapplied Narrow Tailoring Analysis in Contravention of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

Given the secondary effects evidence upon which the City relied, the narrow scope of the San Antonio ordinance, and the lack of evidence to support Respondent's assumption, it is clear that the decision below misapplied the narrow tailoring prong of the time, place, and manner test.

Under that test, a regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). Provided that the regulation is not "substantially broader than necessary,"an ordinance "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1999).

Narrow tailoring "does not turn on a judge's agreement" with the legislative body "'concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Id.* (quoting *Albertini*, *supra* at 689).

These principles are well-established in the Court's adult business zoning cases. *Renton* held that "[the] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 475 U.S. at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion). In *Alameda Books*, the Court reiterated *Renton's* deferential "reasonably believe to be relevant" standard for legislative evidence and emphasized that "courts should not be in the business of second-guessing" the factual determinations of city planners. *Id.* at 451 (Kennedy, J., concurring in judgment).

In this case, the City's ordinance does not sweep substantially broader than necessary to serve its substantial interest in protecting residences from the adverse effects of adult bookstores. As detailed above, *supra* pp. 2-4, these effects range from adverse impacts on property resale values to the problem of pornographic litter. *See World Wide Video of Washington, Inc. v. Spokane Arcade*, 227 F.Supp.2d 1143, 1158-59 (E.D. Wash. 2002). The City contends that these problems are linked to the presence of an adult bookstore, regardless of whether the store has peep show booths. This inference is reasonable, and the lower court erred in rejecting it. *Alameda Books*, 535 U.S. at 452 (Kennedy, J., concurring in judgment).

Although the court below disagreed with the City's planners "concerning the most appropriate method for promoting significant government interests," the record offers no support for its assumption that the City's adult business ordinance targets mainstream establishments.

Nor does narrow tailoring analysis permit invalidation of the ordinance simply because the lower court would have set a higher percentage of sexually graphic inventory for defining an

adult use or would have implemented a less restrictive measure of addressing secondary effects. In essence, the lower court imposed an empirical proof requirement – which was rejected in *Alameda Books*, 535 U.S. at 439 (plurality) – and then substituted its own assumption for the predictive judgment of the City's land use planners. In doing so, the court created a circuit conflict and contravened both *Renton* and *Alameda Books*. Accordingly, this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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